No. ~~718~~ 48

In the Supreme Court of the United States

OCTOBER TERM, 1954

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA, PETITIONER

v.

SUBVERSIVE ACTIVITIES CONTROL BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The majority (Op. 1–76, R. 2083–2158)[1] and dissenting (Op. 76–89, R. 2158–2171) opinions in the Court of Appeals have not yet been reported. The Report of the Subversive Activities Control

[1] Like petitioner, we shall use "R." to refer to the printed Joint Appendix in the Court of Appeals and the proceedings in that court. For the Court's convenience, references herein to the opinions in the Court of Appeals will include both the "R." reference and the page number of the pamphlet copy (which we shall indicate by "Op.").

Board appears at R. 1–137 and also at R. 1803–2051.[2]

JURISDICTION

The judgment of the Court of Appeals was entered on December 23, 1954 (R. 2172), and a petition for rehearing (R. 2173–2198) was denied on January 14, 1955 (R. 2199, 2200). The petition for a writ of certiorari was filed on April 13, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 and Section 14 (a) of the Subversive Activities Control Act of 1950 (see Pet. App. 121–122).

QUESTIONS PRESENTED

1. Whether the legislative findings and criteria included in the Subversive Activities Control Act deprived petitioner of a fair hearing. (Pet. Ques. 1.)

2. Whether the consequences of registration under the Act are such as to invalidate the registration requirement under the due-process clause. (Pet. Ques. 1.)

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[2] The Report as it appears at R. 1–137 is the unannotated version, published as Sen. Doc. No. 41, 83d Cong., 1st sess. At R. 1803–2051 it appears in annotated form, *i. e.*, with record references keyed to the Joint Appendix below (herein referred to as "R."). The annotated version was filed in the court below as an appendix to respondent's brief. Whenever we have occasion to refer to the Report, we shall first give the reference to the unannotated version and then, in brackets, the reference to the annotated version, *e. g.*, "R. 1–137 [1803–2051]."

3. Whether the fact that at such time as the order requiring petitioner to register becomes final some individual will be required to effect registration for petitioner raises questions in this proceeding as to the validity of the Act under the self-incrimination clause and, if so, whether the Act is for this reason invalid. (Pet. Ques. 1.)

4. Whether the consequences of registration with respect to future activities of petitioner are such as to invalidate the Act as an interference with free speech and peaceable assembly in violation of the First Amendment. (Pet. Ques. 1.)

5. Whether the court below erred in affirming the order of the Board as founded on a correct construction of the requirements of the Act and as supported by a preponderance of the evidence. (Pet. Ques. 2–7.)

6. Whether the court below properly rejected petitioner's attack on the Board as biased. (Pet. Ques. 8.)

7. Whether the court below properly exercised its discretion in denying petitioner's motion for leave to adduce additional evidence. (Pet. Ques. 9.)

8. Whether the recess appointments of three of the Board's members were valid, and whether in any event the Board's final order is valid, it being undisputed that the Board was properly constituted at the time of the order and from a date early in the course of the hearings herein. (Pet. Ques. 10.)

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STATUTES INVOLVED

The pertinent provisions of the Subversive Activities Control Act of 1950 (Title I of the Internal Security Act of [September 23,] 1950, c. 1024, 64 Stat. 987, 50 U. S. C. 781 *ff.*), as amended, the Immigration and Nationality Act [of June 27, 1952], c. 477, 66 Stat. 163, and the Communist Control Act of [August 24,] 1954, c. 886, 68 Stat. 775, are set forth in Appendix B to the petition for certiorari (Pet. 86–131).

STATEMENT

On November 22, 1950, the Attorney General, pursuant to Section 13 (a) of the Subversive Activities Control Act of 1950 (hereafter referred to as the Act), filed with the Subversive Activities Control Board (respondent herein, and hereafter referred to as the Board) a petition (R. 143–159) for an order directing the present petitioner, the Communist Party of the United States, to register with him as a "Communist-action organization" in the manner required by Section 7 (a), (c), and (d) of the Act. On February 14 and April 3, 1951, respectively, petitioner filed an answer (R. 160–161) and amended answer (R. 161–187) in which, *inter alia*, it denied being a Communist-action organization as defined by Section 3 (3) of the Act.

Hearings for the purpose of taking evidence commenced on April 23, 1951, before three members of the Board sitting as a hearing panel

(R. 1). On October 20, 1951, one member of the hearing panel (Charles M. LaFollette) became unavailable to the Board by virtue of the adjournment of Congress without taking action on his nomination. The hearing proceeded before the remaining two members of the panel, who were present and participated during the entire hearing. The hearings ended on July 1, 1952. (R. 1, 2.)

On October 20, 1952, the hearing panel issued its recommended decision finding petitioner to be a Communist-action organization and recommending that the Board order it to register as such. Thereafter exceptions to the recommended decision and various motions were filed and argued. (R. 2.) On April 20, 1953, the Board issued its Report (R. 1–137 [1803–2051]) and order (R. 138 [2052]) directing petitioner to register in accordance with the finding that it was a Communist-action organization. The Report was unanimous.[3] "Upon the overwhelming weight of the evidence in this proceeding," the Report concluded, "we find that [petitioner] is substantially

[3] The Report was signed by three members of the Board (R. 132 [2042]). The fourth member of the Board filed a short concurring opinion in which he stated that he was "fully in accord with and concur in the findings and in the determination that the Respondent herein, the Communist Party of the United States of America, is a Communist-action organization under subsection (3) of Section 3 of the Act and required to register as such under Section 7" (R. 133 [2042–2043]).

directed, dominated, and controlled by the Soviet Union, which controls the world Communist movement referred to in Section 2 of the Act; and that [petitioner] operates primarily to advance the objectives of such world Communist movement" (R. 132 [2042]).[4]

On June 17, 1953, petitioner, pursuant to Section 14 (a) of the Act, filed in the United States Court of Appeals for the District of Columbia Circuit a petition for review (R. 139–142) of the Board's order. Following submission of the case on briefs and oral argument, the court, on September 13, 1954, set the case for reargument, the order directing counsel to discuss, *inter alia*, "the effect, if any, of the Communist Control Act of [August 24,] 1954, upon the order here under review" (R. 2081). On December 23, 1954, following the submission of further briefs and oral argument, the order of the Board was affirmed (R. 2172), one judge dissenting. The

[4] Under Section 3 (3) of the Act, this finding brought petitioner within the definition of a "Communist-action organization." The evidence on which the Board's finding was based is set forth in detail in the Report at R. 4–128 [1809–2034]), the bracketed reference containing the supporting references to the testimony and exhibits. The Board's Report summarizes the evidence on both sides. Where issues of credibility are encountered on important points, the Board has recorded its position. Similarly, where there are conflicts in testimony on particular issues, the Board has resolved them. There is therefore, we feel, no need to attempt to summarize the voluminous evidence supporting the Board's particular findings and ultimate finding.

court, while modifying two of the Board's subsidiary findings of fact (Op. 72, 73–74, R. 2154, 2155–2156; see *infra*, pp. 30–33), held nevertheless, after a painstaking review of the evidence (Op. 48–75, R. 2130–2157), that the "ultimate finding of the Board"—*i. e.*, that petitioner "is substantially directed, dominated and controlled by the Soviet Union, which controls the world Communist movement referred to in Section 2 of the Act" and "operates primarily to advance the objectives of such world Communist movement"—"is supported by the basic findings which are in our opinion supported by a preponderance of the evidence, and that the ultimate finding is itself supported by a preponderance of the evidence" (Op. 75–76, R. 2157–2158).

Other pertinent facts will be stated at appropriate points in the Argument.

SUMMARY OF ARGUMENT

A. Constitutionality of the Act

1. The legislative findings and statutory criteria under the due process clause

The contention that Congress incorporated into the Act a "built-in finding" against petitioner "by legislative fiat" by reason of the findings embodied in Section 2 as to the existence of a "world Communist movement" and a "Communist movement in the United States" confuses two sets of facts—the legislative facts and the adjudicative facts. To come within the purview of the Act, an organization must be found by the Board, on evidence whose sufficiency is sub-

ject to judicial review, to be substantially controlled by the foreign country or organization controlling the world Communist movement and to operate primarily to advance the objectives of that movement.

The Act is basically a regulatory measure. The so-called "sanctions" which become applicable upon an organization's registration or a final order to register have prospective effect only, thus lacking a fundamental characteristic of bills of attainder—the imposition of punishment for *past* conduct. Criminal penalties for noncompliance with the Act's terms can be imposed only after trial by jury.

The Act does not authorize a determination that an organization is a Communist-action organization on the basis of irrational or vague criteria. The listed criteria indicate types of evidence relevant to the ultimate factual issue of whether an organization fulfills the Act's definition of a Communist-action organization. Section 13 (e) contains no formula, nor are the listed criteria in any sense exclusive.

2. The consequences of registration on officers and members of petitioner.

The Act does not deprive petitioner's members of liberty and property merely by reason of their association, without proof of *scienter*. The "sanctions" are applicable only where it is shown that the member concerned has knowledge or notice

that the organization has registered or been finally ordered to register as a Communist-action organization.

3. The requirement of registration and self-incrimination

The contention that the Act "violates the privilege against self-incrimination" is at least premature in this proceeding. The privilege is a personal one, not available to an organization as such. In the case of a demand for the production of an organization's records, an officer of the organization may not refuse to produce them even if they would tend to incriminate him personally. *United States* v. *White,* 322 U. S. 694. Moreover, even if the *White* rule were considered inapplicable here, the privilege would protect only the person called upon to submit the registration statement. And even as to him, he would have to claim his privilege. It cannot be assumed at this time that officials of petitioner will inevitably claim the privilege when called on to effect petitioner's registration, especially since the top officials of petitioner, who would be the ones required to file the registration statement, have never attempted to conceal their membership or their places of leadership.

4. The consequences of registration and the First Amendment

The Act is not violative of First Amendment freedoms. If Congress, in order to protect interstate commerce, can validly deny the privileges of union office to members of the Communist Party

because of the program of that Party (*American Communications Assn.* v. *Douds*, 339 U. S. 382), it can, in order to protect the Government itself, impose restrictions upon adherents of a world Communist movement such as that described in the Act. The disclosure requirements of the Act are reasonable in the light of the legislative findings set forth in Section 2. The "sanctions" imposed on covered organizations and their members are reasonably related to the evil at which Congress was aiming.

B. The proceeding before the Board

1. The Court of Appeals' modification of two of the eight subsidiary findings of the Board did not necessitate remand of the case to the Board. Affirmance of the Board's order was proper in view of the court's finding that the Board's ultimate finding of fact was fully supported by a preponderance of the evidence.

2. The Board did not place too much reliance on pre-Act evidence in reaching its conclusion that petitioner is a Communist-action organization. An organization's past is clearly pertinent to its present nature.

3. The Board and the Court of Appeals did not misconstrue or misapply any of the evidentiary criteria of Section 13 (e). The contention that the Board found "a century-old, constantly evolving system of political thought [Marxism-Leninism]" to constitute "a series of Soviet 'direc-

tives'" to petitioner is based on a distortion of the Board's report. The "non-deviation" criterion refers to "identity or coincidence and not to chronological adoption."

4. The contention that the Board and Court of Appeals "erroneously construed and applied the Act's definition of the world Communist movement" is based on the incorrect assumption that the existence of "a world Communist movement" as found by Congress in Section 2 of the Act was subject to redetermination in the administrative proceeding.

5. In view of the substantial concurrence of the Court of Appeals in the Board's findings, there is no occasion for further review by this Court of the sufficiency of the evidence.

C. The attack on the Board as biased

1. The argument that the Board was "necessarily biased" against petitioner because it would have rendered itself *functus officio* if it found petitioner not to be a Communist-action organization is unsound. It is tantamount to a charge that the Board members were bound to violate their oaths of office.

2. The hearing was not unfair. The speech of Dr. McHale of which petitioner complains did not manifest prejudgment of the issues. The appearance of Board Chairman Brown on a television program in which he discussed the case occurred *after* he and Dr. McHale, constituting

the hearing panel, had handed down their recommended decision.

D. Petitioner's motion for leave to adduce additional evidence

The Court of Appeals appropriately exercised its discretion in denying petitioner's motion for leave to adduce additional evidence before the Board. The court could properly conclude from the motion papers and the Board's opposing memorandum that even if the testimony of the three witnesses who allegedly gave false testimony were completely disregarded the final result could not be different.

E. The validity of the appointments of members of the Board

The recess appointments of the three Board members in question were valid when made and remained valid at all times thereafter until final Senate confirmation. Petitioner's challenge of the appointments is based on technical arguments which have been considered and found untenable by the authorities. Furthermore, even if there were technical merit in any of the arguments, the validity of the Board's final order would not be affected, since it is undisputed that the appointments were valid from August 9, 1951, a date shortly after the beginning of the taking of testimony and long prior to the issuance of the order under review.

ARGUMENT

A. Constitutionality of the Act

1. The legislative findings and statutory criteria under the due process clause

a. Petitioner contends (Pet. 47–50, 14–16) that the legislative findings embodied in Section 2 of the Act as to the existence of a "world Communist movement" (subsection (1)) and a "Communist movement in the United States" presenting "a clear and present danger to the security of the United States" (subsection (15)) constitute a partial predetermination of the issue that the Board was called upon to decide, namely, whether petitioner is a "Communist-action organization" within Section 3 (3). Section 3 (3), it is pointed out, defines such an organization as one substantially controlled by the government or organization controlling the world Communist movement referred to in Section 2 and operating primarily to advance the objectives of that movement. It is urged that this partial predetermination "by legislative fiat" "violates due process" (Pet. 47) and incorporates into the Act a "built-in finding" against petitioner (Pet. 50).

Petitioner's contention seems in essence to be that due process requires that the legislative findings of Section 2 be the subject of redetermination in the administrative proceeding in a "free adjudication of the facts" (Pet. 48). We submit that the argument confuses two sets of facts—the *legislative* facts which reasonably tend to establish a situation which Congress, on investi-

gation, has found to require legislative action, and the *adjudicative* facts which, on proof in adversary litigation, bring a specific organization or person within the purview of the legislation enacted. See McCormick, *Judicial Notice,* 5 Vand. L. Rev. 296, 315–318. Legislative facts are general conclusions which support the policy of a particular law, and can be attacked only by showing that Congress acted arbitrarily or unreasonably or beyond its delegated powers. *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 465–466; *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152–153. The facts on which the legislature acted can frequently be the subject of judicial notice; in other cases the courts may make inquiry to determine whether there is a reasonable basis for the legislative action. *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, 210; *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543, 548; see McCormick, *Judicial Notice,* 5 Vand. L. Rev. 296, 315–318. But at most the inquiry is as to whether the legislature has acted reasonably. Here, Congress recorded in Section 2 the basis for its action, the threat to the United States presented by the world and American Communist movement.

As this Court said with respect to these very findings, in *Galvan* v. *Press,* 347 U. S. 522, 529:

> On the basis of extensive investigation Congress made many findings, including that

> in § 2 (1) of the [Internal Security] Act that the "Communist movement * * * is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship" * * *. Certainly, we cannot say that this classification by Congress is so baseless as to be violative of due process and therefore beyond the power of Congress.

Even if Congress had specifically identified petitioner by name as the "Communist organization in the United States" to which it refers in Section 2 (15), the adjudicative or operational facts which would bring it within the definition of Section 3 (3) would not have thereby been legislatively predetermined in a sense offensive to the requirements of due process. A Communist organization which is not "substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement" *or* which does not "operate primarily to advance the objectives of such world Communist movement" would be excluded by the definition. There would not, in short, be anything in the Act, even if Congress had thus named petitioner, to have prevented the Board from finding that petitioner lacked the essential features on which the Act made the requirement

of registration depend.[5] That Congress may have believed that petitioner would fall within the definition of Section 3 (3) is of no moment so far as the requirements of due process are concerned. We assume that Congress supposes in the case of many of the statutes it passes that specific organizations or persons will be subject to their terms. As the court below observed, "A statute is not necessarily null merely because it fits a known person. Many valid statutes do" (Op. 40, R. 2122). The important point is that Congress required proof of the operative facts by a preponderance of the evidence, and made the Board's decisions subject to judicial review before any requirement of the Act could become effective.[6]

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[5] For this reason the fact that Section 4 of the Communist Control Act of 1954 (see also Section 2 of that Act) referred to petitioner by name as a "Communist-action" organization does not, we submit, contrary to petitioner's contention (Pet. 50), add weight to its basic argument. In any event, since that Act was passed after the issuance of the order under review, it is evident that the Act's designation of petitioner by name could not have influenced the Board's deliberations or otherwise affected the administrative proceeding.

[6] The decisions cited by petitioner (Pet. 48), of which *Tot* v. *United States*, 319 U. S. 463, is representative, concern the validity of statutory presumptions under the due-process clause. They hold that, in the language of *Tot* (*id.*, 467), "a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." But the Subversive Activities Control Act creates no statutory presumptions (see Op. 43, R. 2125). Such decisions, therefore, do not aid petitioner's attack on the legislative findings included in the Act.

b. Petitioner's contention (Pet. 50–51) that the Act "is invalid as a bill of attainder because it identifies petitioner as the object of the statutory sanctions and imposes punishment on petitioner and its members without a judicial trial" is similarly without merit. Bills of attainder are "legislative acts * * * that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." *United States* v. *Lovett*, 328 U. S. 303, 315. "Punishment is a prerequisite." *Garner* v. *Los Angeles Board*, 341 U. S. 716, 722. And the conduct punished must be *past* conduct. *American Communications Assn.* v. *Douds*, 339 U. S. 382, 413–414.

The Subversive Activities Control Act is not a statute of this type. It is basically a regulatory measure requiring registration and disclosure of membership and financial data on the part of organizations which either admit being or are duly found to be within its scope (Section 7). Of course, like all registration statutes it provides criminal penalties for willful failure to register when required [7] and for making

[7] The Act provides that "each day of failure to register * * * shall constitute a separate offense" (Section 15 (a)). Petitioner complains that this makes the penalty for non-registration "potentially astronomical" (Pet. 7). It is clear, however, that there cannot be any such accumulation of penalties unless an organization chooses to incur them by

willfully false registration statements (Section 15 (a) and (b)). In addition, it contains certain so-called "sanctions" (see Op. 5, R. 2087) which become applicable upon registration or final order to register. Some of these sanctions apply to covered organizations as such. For example, organizational mail and broadcasts must be labeled and identified in the manner and under the conditions specified in Section 10, in order that the public may be able to identify such mail and broadcasts as emanating from a "Communist organization." In addition, certain withholdings of legislative grace in the nature of tax benefits are provided for (Section 11). Other "sanctions" pertain to members of covered organizations. For example, after an organization has registered or been finally ordered to register, its members become ineligible for non-elective employment by the United States as well as for employment in defense facilities and with labor organizations as defined in the National Labor Relations Act (Section 5). They also become ineligible to obtain

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continued non-compliance after a final order. The organization is not obliged to incur liability under Section 15 (a) to test the validity of the registration requirements. Cf. *Gulf, Colorado & Santa Fe Ry. Co.* v. *Texas*, 246 U. S. 58, 62; *Ex parte Young*, 209 U. S. 123, 145–148. The duty arises only after the validity of the registration requirements has been determined and a final order has resulted. Thus, liability results only from its willful refusal to comply with a requirement laid down by Congress and upheld by the courts.

or use passports (Section 6).[8] The validity of these sanctions may possibly not be presented at the present stage (cf. *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 434 *et seq.*), but in any case none of these have retroactive effect. By their terms they apply only to persons continuing membership in a covered organization after it has registered or been ordered to register. Since the sanctions in no sense impose disabilities for "*past* actions," they lack a fundamental characteristic of bills of attainder—the imposition of punishment for *past* conduct. *American Communications Assn.* v. *Douds*, 339 U. S. 382, 413–414; cf. *Garner* v. *Los Angeles Board, supra*, 341 U. S. 716, 722–723. See Op. 40, R. 2122. And, of course, with respect to such punishable acts as failure to disclose membership in seeking prohibited employment (Section 5 (a) (1)) and applying for or using a passport while continuing to be a member of a covered organization (Section 6 (a)), knowledge or notice that the organization is registered or has been ordered to register is an essential ingredient of the offense,

[8] In addition, if aliens, they become excludable and deportable under certain conditions (Section 22, carried forward by §§ 212 (a) (28) (E) and 241 (a) (6) (E) of the Immigration and Nationality Act of June 27, 1952; see Pet. 125–126). Such provisions are not penal in character. See *Galvan* v. *Press*, 347 U. S. 522, 529–530; cf. *Harisiades* v. *Shaughnessy*, 342 U. S. 580.

and punishment can be imposed only after trial by jury (Section 15 (c)).

c. Petitioner next contends (Pet. 51–54, 16–18) that the Act "violates due process because it authorizes a determination that an organization is a Communist-action organization on the basis of irrational and vague criteria" (Pet. 51). The insubstantiality of this contention is forcefully demonstrated in the opinion below (Op. 40–46, R. 2122–2128). We submit that petitioner fails to show, as it claims to show, that the opinion below "begs the question" (Pet. 52). A perusal of the eight criteria listed in Section 13 (e)—and see particularly the "directives and policies" criterion of Section 13 (e) (1)—shows their rational basis as indicating types of evidence relevant to the ultimate factual issue of whether the organization meets the decisive test of a "Communist-action organization" as set forth in Section 3 (3), namely, whether it is controlled by the foreign government or organization controlling the world Communist movement and operates primarily to advance the objectives of that movement as described in Section 2. Section 13 (e) contains no formula, nor are the listed criteria in any sense exclusive. Petitioner's argument assumes that Section 13 (e) permits an organization to be held subject to registration as a Communist-action organization under the Act if it is controlled by the foreign government or or-

ganization referred to in Section 3 (3) even if *all* of its objectives are as "benign" (Pet. 52), say, as the improvement of race relations. This interpretation patently distorts the meaning of Sections 2, 3 (3), and 13 (e) when read together, as they must be, in determining the requirements of the Act.

2. The consequences of registration on officers and members of petitioner

a. Petitioner contends (Pet. 55–57, 8–9) that the Act "violates due process by depriving petitioner's members of liberty and property merely by reason of their association, without proof of scienter and without according them a hearing" (Pet. 55). Of course, no members are before the Court, but the contention, if properly here, is thoroughly refuted by the opinion below (Op. 25–28, R. 2107–2110). As is there pointed out, a necessary condition of the applicability of any of the Act's "sanctions" against members of an organization is knowledge or notice that the organization has registered or been finally ordered to register (Op. 25–26, R. 2107–2108). "If the organization has registered as a Communist-action organization without an order to do so, it has voluntarily agreed that it is such an organization. If a final order has been entered against it, its nature as such an organization has been determined by full administrative proceedings, fully reviewed by the courts. So

notice or knowledge of registration carries knowledge or notice of the nature of the organization; its nature has been either admitted or established" (Op. 26, R. 2108). The *scienter* requirement of *Wieman* v. *Updegraff*, 344 U. S. 183, 188–191, on which decision petitioner relies (Pet. 56), is thus fully met, as the opinion below points out (Op. 27–28, R. 2109–2110).*

b. Petitioner also argues (Pet. 57–58, 7) that "the registration requirement of the Act violates due process by virtue of the fact that Section 5 of the Communist Control Act [of 1954] makes it impossible to determine who must be registered as members" (Pet. 57). This contention is based on a mistaken interpretation of Section 5 of the 1954 Act, which appears at Pet. App. 130–131. That section does not, as petitioner supposes, establish controlling "criteria for membership in the Communist Party" (Pet. 57).

The evident purpose of Section 5 of the 1954 Act is to list certain items of *relevant evidence* to be considered by juries under proper instructions in determining whether some one is *actually* a member of the Communist Party, not to lay

* The opinion below observes that "Membership in an organization is of course a fact, and if one is actually a member he knows it" (Op. 26, R. 2108). Petitioner takes issue with this, saying, "it is not correct that 'members' [of it] have knowledge of their 'membership'" (Pet. 56–57). The argument is based, however, on a mistaken interpretation of Section 5 of the Communist Control Act of 1954, as we show in the text.

down individual criteria of membership of which any single one might suffice. Petitioner's attempt to depict the section as a trap for the unwary—as a snare for catching as members persons who do not know they are members—cannot therefore stand analysis.[10]

3. The requirement of registration and self-incrimination

Petitioner contends (Pet. 58–59) that the Act "is invalid because it violates the privilege against self-incrimination" (Pet. 58). "The legislative scheme of the Act," it argues, "culminates in an attempt to coerce confessions of membership in the Communist Party * * *. This is a crass violation of the privilege against self-incrimination. *Blau* v. *United States,* 340 U. S. 159" (Pet. 59). We submit that the majority opinion below[11] (see Op. 16–25, R. 2098–2107) convincingly shows that the question of self-incrimination is not effectively presented in this proceeding.

Most important, the privilege against self-incrimination is a personal privilege, available

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[10] Petitioner's argument on this point involves the same kind of reasoning underlying its contention that the criteria of Section 13 (e) are irrational. See pp. 20–21, *supra.*

[11] Judge Bazelon dissented from the decision of the court below (Op. 76, R. 2158) on the ground that the Act necessarily requires individuals to disclose their own membership in a criminal conspiracy and therefore should be held invalid in this proceeding notwithstanding the fact that no official has as yet declined to register for petitioner on self-incrimination grounds.

neither to an organization as such nor (in the case of a demand for the production of an organization's records which would allegedly tend to incriminate personally members of the organization, *including the officers required to produce them*) to the officers of the organization having custody of its records in their representative capacity. *United States* v. *White*, 322 U. S. 694. That this principle applies to the Communist Party is clear. *Rogers* v. *United States*, 340 U. S. 367, 371–372. The rule is relevant to the case at bar. The Act, it is true, calls for the preparation and submission of a registration statement by covered organizations containing the names and addresses of officers and members and an accounting of moneys received and expended (Section 7 (d)) and not the production of physical records as such. But as the majority opinion observes, "membership lists and accountings for money furnished by an organization are reproductions of or extracts from organization records" (Op. 17, R. 2099).

Moreover, even if the *White* rule were considered inapplicable in the context of the instant case, it is clear that the privilege against self-incrimination would protect only the person called upon to submit the registration statement, and would protect him only in so far as his own name was involved; that is, he could not under the guise of protecting himself against *self*-incrimination seek to shield others.

We recognize, as did the court below (Op. 19, R. 2101), that the official of petitioner who filed the registration statement (see Section 7 (h)) would by the act of filing, even if he were to omit his own name from the membership list, be admitting that he is a member and an officer of petitioner. But this does not mean, as the majority point out (Op. 19–23, R. 2101–2105), that the statute or the order requiring petitioner to register is invalid.

In the first place, it is well settled that the privilege against self-incrimination is a privilege which must be personally and explicitly claimed. *Rogers* v. *United States, supra,* 340 U. S. 367, 370; *United States* v. *Monia,* 317 U. S. 424, 427; *United States* v. *Murdock,* 284 U. S. 141, 148; *Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103, 113. The question as to the effect of the privilege will not arise until the order of the Board becomes final and petitioner is required to register.

Secondly, it cannot be assumed at this time that a claim of privilege will inevitably be made when petitioner is confronted by the statutory requirement that it register, so that (according to the argument) the constitutionality of the requirement should be settled in this proceeding. This argument not only runs counter to the settled rule of deferring decision of constitutional questions until they are ripe for review, but is particularly inappropriate in this case since, as the majority opinion observes, the top officials of petitioner,

who would be the ones called on to file the registration statement (see Section 7 (h)), "have never attempted to conceal their membership or their places of leadership" (Op. 20, R. 2102). Hence there is "no basis for assuming that they would claim protection against a mere revelation of their [own] membership" (*ibid.*).[12]

A question which might also arise if a future claim of privilege should be made (see Op. 22–23, R. 2104–2105), is as to the possible effect, if invoked by the Attorney General, of the new immunity statute on the claim (see 18 U. S. C. 3486 (c), as created by the Act of August 20, 1954, c. 769, § 1, 68 Stat. 745).[13]

Accordingly, while we recognize the importance of the underlying issue, we think the court below was correct when it concluded (Op. 23, R. 2105) that neither the Act nor the order requiring an organization *as such* to register can be held

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[12] As pointed out in the dissenting opinion below (Op. 86, R. 2168, n. 39), one of the grounds urged by petitioner in a suit which it brought to enjoin the proceedings before the Board was that "to properly defend itself at such hearings Communist Party officials would necessarily have to testify and that such testimony would necessarily entail their admission of Communist Party affiliations." After its suit to enjoin the proceedings was denied, officials of petitioner did appear and testify at the Board hearings (see R. 136 [2049]).

[13] If a claim of privilege should in fact be made in connection with the registration of petitioner, questions might also arise as to whether the claim should be rejected under the principle of waiver. See Op. 20–22, R. 2102–2104. *Cf. Rogers v. United States*, 340 U. S. 367, 372–373.

invalid because of the possibility that questions as to the availability of the privilege to an officer or member of the organization might arise under various hypothetical future situations.

4. The consequences of registration and the First Amendment

Petitioner challenges the Act as violative of First Amendment freedoms (Pet. 59–66, 7–11). Inasmuch as the Court of Appeals analyzed this contention in all its aspects (Op. 10–16, 32–38, R. 2092–2098, 2114–2120), we need not go over the same ground here. The court below reasoned, *inter alia*, that "if Congress, in order to protect interstate commerce, can validly deny the privileges of union office to members of the Communist Party because of the program of that Party [as held in *American Communications Assn.* v. *Douds*, 339 U. S. 382], it can, in order to protect the Government itself, impose restrictions upon adherents of a world Communist movement such as that described in this statute" (Op. 15, R. 2097).

The Act is fundamentally a registration statute requiring the disclosure of certain information—principally relating to membership and finances—by local action organizations under the control and domination of a foreign power and operating primarily to advance the objectives of the world Communist movement, which Congress has found and declared after due investigation to pose a threat to the national security. Reasonable dis-

closure requirements have never been thought to be inconsistent with First Amendment freedoms. See *United States* v. *Harriss*, 347 U. S. 612, 625–6; *Viereck* v. *United States*, 318 U. S. 236; *Burroughs and Cannon* v. *United States*, 290 U. S. 534, 545; *Bryant* v. *Zimmerman*, 278 U. S. 63, 72–73; *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288, 313–316. In the light of the legislative findings set forth in Section 2, the Act's disclosure requirements are clearly reasonable. The so-called "sanctions" (see pp. 18–19, *supra*) imposed by the Act on organizations subject to its terms (see Op. 35–36, 38, R. 2117–2118, 2120) and on members of such organizations (see Op. 33–35, 36–37, R. 2115–2117, 2118–2119) are, as the court below held, "reasonably related to the substantive evil at which Congress was aiming" (Op. 32, R. 2114). Moreover, as we have seen, these sanctions operate only *in futuro*, and only as to members having knowledge that the organization has registered or been finally ordered to register. Members, by *bona fide* resignation, can escape them. Cf. *American Communications Assn.* v. *Douds*, *supra*, 339 U. S. 382, 413–414.

Underlying the present contention of petitioner in all its facets is the charge that the Act unlawfully abridges "innocent and lawful advocacy and assembly" (Pet. 61) as well as "seditious advocacy" (Pet. 63). But apart from the labeling requirements of Section 10, the Act imposes no

restrictions on covered organizations' freedom to issue literature or to broadcast propaganda. And the labeling provisions are reasonable adjuncts to the basic disclosure requirements. As the court below remarked, "surely the people are entitled to know when an organization which falls within the definition of a Communist-action organization in this statute is addressing them over the air" (Op. 36, R. 2118). And the same is true with respect to the circularization of mail matter. Congress has the power to compel disclosure of facts which every citizen has the right to know. Petitioner's exhortations to the effect that such identification constitutes a prior restraint on its activities is simply an admission that it cannot secure adherents unless it can camouflage its activities. Certainly, the Communist Party cannot object to having its views labelled as those of "the Communist Party, a Communist organization." [14]

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[14] In its effort to depict the Act as violative of the First Amendment, petitioner has been compelled to distort it. For example:

(1) It says, "the Act and the order suppress all of petitioner's activities" (Pet. 60). This is patently not so, as we have shown.

(2) It refers to the Act as having accomplished "the proscription of peaceful advocacy and assembly by outlawing" covered organizations (Pet. 61). The Act does not proscribe peaceful advocacy and does not outlaw any organizations.

(3) It says that the Act "forecloses employment to a member" (Pet. 62). The Act forecloses *certain kinds* of em-

B. The proceeding before the Board

Petitioner attacks the adequacy of the proceedings before the Board and in the court below in a number of respects, all of which are insubstantial and present no questions calling for review by this Court.

1. Petitioner contends (Pet. 66–68) that "[t]he action of the court below in sustaining the order of the Board after striking two of the key findings on which it was based violates the Act and is in conflict with applicable decisions of this Court" (Pet. 66). The case should have been remanded to the Board, it is argued, "for administrative redetermination in the light of the findings which survived" (Pet. 67). The conten-

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ployment (see Section 5) to members of covered organizations under certain conditions.

(4) It says that the Act punishes "'non-deviation' from Soviet views" (Pet. 65). The Act establishes "non-deviation" as *one* of eight listed (but not exclusive) guides to the consideration of evidence (Section 13 (e)) to be taken into consideration in determining whether an organization is a "Communist-action organization" as defined in Section 3 (3).

(5) It says, "The listing or self-listing of members of petitioner in compliance with a registration order has been made an impossible task by Section 5 of the Communist Control Act" (Pet. 7). We have previously shown how this charge is based on a distortion of the cited section (*supra*, pp. 22–23).

(6) It says that an organization which "has any dealings with" a Communist-action organization or members thereof "is itself in danger of being proscribed as a front or infiltrated organization" (Pet. 10). The sections of the Act cited in support of this sweeping charge—Sections 13 (f) and 13A (e)—manifestly fail to do so.

tion is clearly insubstantial, as will be evident from an appreciation of just what the Court of Appeals' "striking" of "two of the key findings" of the Board actually consisted of.

With respect to the Board's subsidiary finding that petitioner "reports to the Soviet Union and its representatives" (R. 98 [1982]; see Section 13 (e) (5) of the Act), the Court of Appeals said (Op. 72, R. 2154):

> * * * There is little doubt about these reports having been made when the Party was a member of the International * * *. There is *some* doubt that a preponderance of the evidence supports the *broad conclusion* that the Party "reports to the Soviet Union and its representatives." Such a conclusion *seems* to imply *constant, systematic reporting as of now.* The evidence indicates instances, as in the cases of Eisler and Peters. On this record we would strike this finding *as phrased. There is a preponderance of evidence, we think, to support a conclusion that upon occasion leaders of the Party report to representatives of the Soviet Union.* [Emphasis supplied.]

The other "key finding" of the Board which the court below "struck" was its subsidiary finding relating to "secret practices" of petitioner (see Section 13 (e) (7)). After reviewing the long history of such practices (R. 105-116 [1993-2012]) and after considering the evidence relat-

ing to their "purpose" (R. 116–117 [2012–2015]), the Board concluded that (R. 117 [2015]):

> * * * the secret practices undertaken by [petitioner] are for the purpose of concealing the true nature of the Party and promoting its objectives. We cannot accept [petitioner's] contention that its secret practices are *merely* devices utilized to protect the rights and liberties of its members. [Emphasis supplied.]

With respect to this finding the Court of Appeals said (Op. 73–74, R. 2155–2156):

> This question, whether the secret practices of the Party are for the purpose of protecting the liberties of the members or are for the purpose of promoting the objectives of the Party, is a nebulous one. *The two purposes may well overlap.* * * * [*B*]*oth purposes could exist together.* In a doubtful situation such as that on this point, we strike the finding *as to purpose.* At the same time we are of opinion that the Party's view of the limited purpose of secrecy is not shown by a preponderance of the evidence. On this point we conclude simply that a defined purpose is not proven. [Emphasis supplied.]

It is clear from the above that what the court below actually did was merely to *modify* two of the Board's eight *subsidiary* findings. The other six subsidiary findings were held to be fully supported by a preponderance of the evi-

dence. The court also found that the Board's ultimate finding of fact—that petitioner "is substantially directed, dominated, and controlled by the Soviet Union, which controls the world Communist movement * * *; and * * * operates primarily to advance the objectives of such world Communist movement" (R. 132 [2042])—was likewise fully supported by a preponderance of the evidence (Op. 75–76, R. 2157–2158). In these circumstances affirmance of the Board's order was plainly the correct action. Cf. *Universal Camera Co.* v. *N. L. R. B.*, 340 U. S. 474, 488; *N. L. R. B.* v. *Nevada Copper Corp.*, 316 U. S. 105; *Foreman & Clark, Inc.* v. *N. L. R. B.*, 215 F. 2d 396, 398 (C. A. 9), certiorari denied, 348 U. S. 887.[15]

2. Petitioner's contention that the Board placed too much reliance on pre-Act evidence in reaching its conclusion that petitioner is a Communist action organization within the Act's meaning

[15] The cases cited by petitioner (Pet. 67–68) are all clearly distinguishable. This is not a case in which it is unclear from the record on just what evidence the administrative findings are based (*N. L. R. B.* v. *Virginia Power Co.*, 314 U. S. 469, 479); nor one in which the administrative order would be sustainable if based on grounds which the record shows were not the actual grounds on which it was based (*S. E. C.* v. *Chenery Corp.*, 318 U. S. 80, 94–95); nor one in which the reviewing court modified an administrative *order* (*F. P. C.* v. *Idaho Power Co.*, 344 U. S. 17, 20–21); nor one in which the administrative findings are "so shrouded in doubt" that the basis of the agency's action is not determinable (*Colorado-Wyoming Gas Co.* v. *F. P. C.*, 324 U. S. 626, 634–635).

(Pet. 68–71) is also without merit. As the court below observed, "The past is clearly pertinent to the present nature of a person or an organization. Surely a person's education and experience are pertinent to his present nature. The same is true of an organization" (Op. 63, R. 2145). For this reason, contrary to petitioner's arguments (Pet. 68, 71), the Board was manifestly correct when it said (R. 130 [2038]):

> In reaching our conclusion herein we have considered and weighed commensurately * * * such pre-Act evidence as reasonably tends to establish or illuminate the present nature, activities, character, and status of [petitioner] in connection with the issues presented for decision. * * * We have been able to trace [petitioner's] operations over more than thirty years into the present and have found that at no time during this period has [petitioner] changed its fundamental objectives, or its nature and purpose. * * *
>
> It would have been unwarranted by law to compel [the Government] to restrict its proof to fragmentary evidence confined to a relatively minute portion of [petitioner's] existence, i. e., the two-month period between the passage of the Act and the filing of the [Government's] petition. * * *

See *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 703–706; *United States* v.

Dennis, 183 F. 2d 201, 231 (C. A. 2), affirmed, 341 U. S. 494.[16]

Petitioner's insistence that its formal disaffiliation with the Communist International in 1940 made that year some sort of cut-off date from an evidential standpoint (Pet. 69, 70) is unavailing. As the court below observed, "The disaffiliation was an organizational separation. The international organization itself was disbanded in 1943, but the world Communist movement did not then cease to exist" (Op. 64, R. 2146).[17]

3. Petitioner next contends (Pet. 71–75, 27–33) that the Board and the court below "erroneously construed and applied" (Pet. 71) four of the evidentiary criteria enumerated in Section 13 (e) of the Act, namely, the "directives and policies," "non-deviation," "discipline," and "allegiance" criteria (paragraphs (1), (2), (6), and (8), respectively, of Section 13 (e)). The contention is without merit.

a. *"Directives and policies"* (Pet. 72–73, 27–28). Section 13 (e) (1) provides that in deter-

[16] Petitioner's attempted distinction of the *Dennis* case (Pet. 71) is unavailing. In the present case as well as in *Dennis*, the acts performed prior to the critical period were treated as "*media concludendi*" as distinguished from "the *factum* itself." See, *e. g.*, the passage from the Board's Report quoted in the text, *supra*, p. 34.

[17] Petitioner admits that the only reason for its 1940 disaffiliation with the Communist International was "to avoid the registration requirements of the then newly enacted Voorhis Act" (Pet. 24–25).

mining whether an organization is a "Communist-action organization" the Board shall take into consideration "the extent to which its policies are formulated and carried out and its activities performed, *pursuant to directives or to effectuate the policies* of the foreign government or foreign organization in which is vested, or under the domination or control of which is exercised, the direction and control of the world Communist movement referred to in section 2" (emphasis supplied). The Board devoted some seventy pages of its Report (R. 9–79 [1819–1948]) to a review and analysis of the evidence pertinent to this heading. Petitioner, ignoring the "policies" half of the criterion, cites two statements from this passage (Pet. 28) as establishing that the Board, erroneously and absurdly, adopted "[t]he thesis that a century-old, constantly evolving system of political thought, developed by thinkers of many nations and based on a comprehensive view of man and nature [Marxism-Leninism], constitutes a series of Soviet 'directives' [to petitioner]" (Pet. 72). Petitioner emphasizes the absurdity of the "thesis" which it thus attributes to the Board by pointing out that "much of the literature from which the Board draws this conclusion was written long before there was a Soviet Union" (Pet. 28, fn. 31). We submit that the

statements in question,[18] when read in their proper context, fail completely to support petitioner's extravagant contention. Their immediate context shows that it was "Marxism-Leninism, as understood, used and followed by [petitioner]" about which the Board was speaking. These concepts, which are carefully elaborated in the Board's Report, cogently support the Board's findings under this heading.

b. "*Non-deviation*" (Pet. 73–74, 28–31). The Board found that "the views and policies of [petitioner] throughout its history invariably coincide with the views and policies of the Soviet Union. Moreover, [petitioner] conforms immediately to each reversal in the Soviet Union's views and policies" (R. 86 [1959]), and concluded that "[petitioner's] views and policies do not deviate from those of the Soviet Union" (*ibid.*). The overwhelming evidence supporting this finding is summarized in the Board's Report at R. 79–86 [1948–1959] and is more briefly re-

[18] The statements relied on by petitioner (Pet. 28) are as follows: (1) "Consequently, we conclude that the [Marxist-Leninist] classics are one of the chief means by which the CPSU directs, dominates, and controls the CPUSA" (R. 43 [1881]); (2) "Marxism-Leninism, as understood, used, and followed by [petitioner], consists of a body of doctrine, policies, strategies, and tactics intended to bring about the end of capitalism and to substitute for it a dictatorship of the proletariat; it has been promulgated and issued by the Soviet Union as the overall philosophy, authoritative rules, directives, and instructions governing the world Communist movement" (R. 78 [1946]).

viewed in the opinion below at Op. 68–69, R. 2150–2151. Petitioner, however, urges that such evidence is insignificant and meaningless unless it appears that in each instance the view it shared with the Soviet Union (1) was adopted by it *after* its adoption by the Soviet Union, (2) did not emanate from a common philosophy, and (3) was not "legitimate," *i. e.*, "calculated to promote the peace and well-being of the United States" (Pet. 73–74, 29–30). Hence, it argues, the Board misconstrued Congress' meaning in establishing the "non-deviation" criterion of Section 13 (e) (2). We think it clear, however, that it is petitioner which has misconstrued the congressional meaning. We submit that the court below was correct in saying that "[t]he statutory phrase refers to identity or coincidence and not to chronological adoption" (Op. 69, R. 2151). It is true, as petitioner says (Pet. 73), that shared views in such fields as mathematics are without evidential significance with respect to questions of domination and control. But the fact that petitioner, in conformity with Soviet views, denounced Fascism in Nazi Germany as a peace menace until the Hitler-Stalin Pact of 1939, following which it about-faced and, with the Soviet Union, hailed the Pact as an outstanding contribution to world peace (see R. 82 [1953]; Op. 68, R. 2150), is evidence of a different character. The evidence in this case was of the latter,

not the former type. Petitioner here, as elsewhere in its petition (see *supra*, pp. 20–21, 22–23), reads one evidential criterion as though it were the ultimate criterion, whereas in fact it refers to but one of many types of evidence which the statute directs the Board to consider in reaching its final determination. For this reason petitioner's suggestion that so far as the non-deviation evidence is concerned it may be the Soviet Union which follows petitioner's views rather than *vice versa* (Pet. 73) cannot be taken seriously.[19]

c. *"Discipline"* and *"Allegiance"* (Pet. 74–75, 31–33). The evidence relevant to the "discipline" and "allegiance" criteria is summarized by the Board at R. 98–104 [1982–1993] and R. 118–128 [2016–2034], respectively, and is more briefly reviewed in the opinion below at Op. 72–73, R. 2154–2155, and Op. 74–75, R. 2156–2157, respectively. A cursory perusal of these passages will indicate, contrary to petitioner's contention, that neither the Board nor the Court of Appeals misconstrued or misapplied those criteria, as set forth in Section 13 (e) (6) and (8), respectively. The contention (Pet. 75) that the Board's finding on

[19] The suggestion also fails to take account of some of the non-deviation evidence itself, notably the evidence that petitioner's overnight change of view as to the justness of the war against Germany *followed* the German invasion of the Soviet Union in June 1941 (see R. 82–83 [1953]; Op. 68, R. 2150). *Cf.* its prompt change of view, referred to in the text, coinciding with the Hitler-Stalin pact.

"allegiance,"[20] as approved by the court below (Op. 75, R. 2157), conflicts with *Schneiderman* v. *United States*, 320 U. S. 118, is plainly without merit. That was a denaturalization case in which documents published after 1927, when Schneiderman was naturalized, were regarded by the Court as being entitled to "little weight" (320 U. S. at 147, 151–152). In the instant case, on the other hand, the Board had before it evidence as to petitioner's interpretation of Marxism-Leninism in the form of conduct and writings extending over a period of more than 30 years, and the testimony of witnesses who held high positions in petitioner for varying numbers of years. This proof established that the Marxist-Leninist classics are used to instill within members of petitioner a loyalty and devotion to the Soviet Union as the "fatherland" of the world-wide Communist revolution as well as to train them for their part in the overthrow of the "imperialist" Government of the United States. Cf. *Dennis* v. *United States*, 341 U. S. 494, 516–517.

4. Petitioner's contention (Pet. 75–76, 34–36) that the Board and the court below "erroneously construed and applied the Act's definition of the world Communist movement" (Pet. 75) is based, as petitioner admits (Pet. 76), on the assumption

[20] *I. e.*, that "[petitioner's] leaders and its members consider the allegiance they owe to the United States as subordinate to their loyalty and obligations to the Soviet Union" (R. 128 [2034]).

that the existence of a "world Communist movement" as found by Congress in Section 2 of the Act was subject to redetermination in the administrative proceeding before the Board. But this assumption is untenable, as the court below held (Op. 56, R. 2138; see pp. 13–16, *supra*). Consequently, it is unnecessary to deal with the present contention. The Board, it is true, deemed it desirable to make an independent finding on the matter based on the evidence before it (R. 4 [1809]). Accordingly it reviewed such evidence (R. 4–9 [1809–1818]) and found that "there exists a world Communist movement, substantially as described in Section 2 of the Act" (R. 9 [1818]). The Court of Appeals, following a review of a "few bits of" the pertinent evidence (Op. 56–61, R. 2138–2143), held that this finding was "supported by a clear preponderance of the evidence" (Op. 61, R. 2143). We submit that the Board's finding is clearly correct. The evidence established far more than "the presence in various countries of the world" of what petitioner describes as "Communist parties which adhere to a common ideology" (Pet. 75). It showed the existence of a world-wide *movement*, substantially as described in Section 2 of the Act (R. 4–9 [1809–1818]).

5. Finally, petitioner's overall challenge of the sufficiency of the evidence to support the Board's findings and order (Pet. 78–79, 22) is manifestly

without merit. The Board, following a thorough review and analysis of the evidence on both sides, found petitioner to be a Communist-action organization within the Act's definition "[u]pon the overwhelming weight of the evidence" (*supra*, pp. 5-6). Its report contains a very thorough summary of the evidence, logically arranged under appropriate headings and subheadings (R. 1–137; R. 1803–2051 (annotated report)). The Court of Appeals, in discharge of its statutory obligation to ascertain that the Board's findings were supported, not merely by substantial evidence, but by "the preponderance of the evidence" (Section 14 (a)), has likewise carefully reviewed the evidence (Op. 48–76, R. 2130–2158) and found that, with the exception of the two subsidiary findings which it modified in the respects already noted (*supra*, pp. 30–33), the Board's findings were clearly supported by the required quantum of evidence. In view of the substantial concurrence of the Court of Appeals in the Board's findings, there is no occasion for further review by this Court of the sufficiency of the evidence.[21]

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[21] Petitioner asserts that "[u]nimpeached documentary evidence established that many of [the Government's] witnesses perjured themselves in the proceeding before the Board" (Pet. 22). The record references cited in support of this sweeping charge, however (Pet. 22, fn. 21), fail to bear it out. At most they reveal the highly argumentative character of the assertion. Typical of the instances of alleged perjury to which petitioner alludes (see R. 1178–1180) is Budenz' testimony on direct examination that Eugene Den-

C. The attack on the Board as biased

1. Petitioner attacks the validity of the proceeding before the Board on the ground that the Board was "necessarily biased" against it (Pet. 54–55, 18–20). "The Board is set up," runs the argument, "as a permanent agency, which originally had the sole function of identifying Communist-action organizations, their members, and Communist-front organizations. Since Communist-front organizations are by definition tools of a Communist-action organization, they can exist only if the Board finds that there is an action organization" (Pet. 19). And since the Act contemplates "the existence in the United States of only one Communist-action organization, the petitioner," the argument concludes, "[i]t is clear * * * that if the Board had decided that the petitioner was not a Communist-action organization, it would have rendered itself functus officio" (*ibid.*).

We submit that there is no need for this Court to enter this area of inference and conjecture. It

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nis, at a certain meeting in the fall or winter of 1939–40, had said that the Communist Party should be prepared, in case the United States entered the war on Britain's side, to "turn the imperialist war into a civil war" (R. 1178). Petitioner's "proof" that this testimony was perjurious consists of Budenz' concession on cross-examination that in his book, *This is My Story*, he wrote that Dennis had said at the meeting in question that the Party should "turn the imperialist war into something else" (R. 1179–1180). Budenz explained, however, that Dennis made both statements at the meeting (R. 1178–1179).

has refused to impute on the theory of constructive bias a dishonest or interested point of view to government employee-jurors in cases to which the Government is a party, including criminal prosecutions of admitted Communists. *Dennis* v. *United States,* 339 U. S. 162; *Frazier* v. *United States,* 335 U. S. 497; *United States* v. *Wood,* 299 U. S. 123. There is no more reason to believe that Board members would violate their oaths of office in a proceeding of this type, which is essentially what according to petitioner's contention the Board members were bound to do. This Court has said, "We cannot agree that courts should assume in advance that an administrative hearing may not be fairly conducted." *Fahey* v. *Mallonee,* 332 U. S. 245, 256; see also *Federal Trade Commission* v. *Cement Institute,* 333 U. S. 683, 700–703; *N. L. R. B.* v. *Air Associates,* 121 F. 2d 586 (C. A. 2). This is especially true where full opportunity for judicial review is afforded by the Act. See *Fahey* v. *Mallonee, supra,* 332 U. S. at 256; *Marquette Cement Mfg. Co.* v. *Federal Trade Commission,* 147 F. 2d 589, 594 (C. A. 7). Moreover, a full and fair hearing was afforded in this case.[22]

2. Equally without merit is petitioner's contention (Pet. 55, 38–40) that it was in fact denied a fair hearing by virtue of the refusal of Board

[22] The remaining aspects of this contention—that the members of the Board "had to rule against petitioner" for financial and patronage reasons (Pet. 20, 54)—involve presumptions which the courts have refused to indulge.

members McHale and Brown to disqualify themselves for alleged bias. The short speech of Dr. McHale which she made during the course of the hearings and which allegedly manifested her bias against petitioner and prejudgment of the issues appears at R. 193–196. We submit that the remarks of Dr. McHale of which petitioner complains (Pet. 39), when read in context, fail to support the contention that she had prejudged the case. The reference to the Hitler-Stalin Pact, which petitioner claims was a prejudgment on the issue of "non-deviation" (Pet. 39), was merely an explanation of what had moved Congress to act, not an explanation of her own belief in the matter (see R. 193–194). Her reference to the congressional finding of the existence of a world Communist movement (R. 194) was nothing more than a statement of publicly known facts and does not indicate any bias on her part.

The appearance of Board Chairman Brown on a television program in which he discussed the case, and which petitioner claims showed his bias against it (Pet. 39), occurred *after* he and Dr. McHale, constituting the hearing panel, had handed down their recommended decision in the case (see his affidavit, R. 206–208, and the Board's memorandum opinion, R. 209–211). It scarcely amounts to bias and prejudice for the Board member to have repeated publicly what he had already made a matter of record—that on the

evidence he had heard he believed petitioner to be a Communist-action organization within the meaning of the Act. He simply repeated the substance of the panel's findings already made and published.[23]

D. Petitioner's motion for leave to adduce additional evidence

Petitioner contends (Pet. 76–78, 40–41) that the Court of Appeals "violated section 14 of the Act by denying petitioner's motion for leave to adduce additional evidence" before the Board (Pet. 76). The contention is without merit.

Section 14 (a) provides that "[i]f either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material, the court may order such additional evidence to be taken before the Board * * *." Such applications are addressed to the sound judical discretion of the court. See *N. L. R. B.* v. *I. & M. Electric Co.*, 318 U. S. 9, 16, and *Southport Petroleum Co.* v. *N. L. R. B.*, 315 U. S. 100, 104, so holding with respect to the like provision of the National Labor Relations Act. Petitioner fails to show that the Court of Appeals abused its discretion in denying petitioner's

[23] Since Mr. LaFollette took no part either in the decision or recommended decision (see *supra*, p. 5), it is unnecessary to consider his alleged intimidation by the McCarran committee (see Pet. 38–39, 54–55).

motion in this case. The motion, which in substance alleged that three of the Government's twenty-two witnesses gave false testimony before the Board, appears in the record at R. 2053–2068. The Board's memorandum in opposition appears at R. 2069–2079. The Board's memorandum pointed out, *inter alia*, on the basis of the record of the proceedings before the Board, that the testimony of the three witnesses in question could "be ignored in toto and the ultimate determination of the Board will remain amply supported by evidence both testimonial and documentary in character" (R. 2073). It concluded as follows (R. 2078–2079):

> It should be borne in mind that the conclusion of the Board that the petitioner is a Communist-action organization * * * is arrived at on the basis of a number of subsidiary findings which comport with the criteria set forth in section 13 (e) of the Act. These subsidiary findings in turn depend upon a vast number of individual findings of fact. Were the testimony of [the three witnesses in question] entirely absent from the record, a relatively few of the myriad individual findings might be disturbed. The effect could be no greater. It is nonsense to maintain that the result would be in any way changed. The petitioner would still be found a Communist-action organization by overwhelming evidence. A hearing should not be reopened

> for the reception of evidence which could not change the result. * * *

It is evident, we submit, that in the light of these considerations, which were fully supported by references to the record, the Court of Appeals properly exercised its discretion in declining to reopen and remand the case. See *United States* v. *Elizabeth Gurley Flynn* (S. D. N. Y., motion to set aside the verdict and for a new trial, decided April 22, 1955), in which District Judge Dimock denied a new trial as to eleven of thirteen defendants convicted under the Smith Act, on the ground that, disregarding entirely the testimony of Harvey Matusow, subsequently claimed by Matusow to have been perjured, there was no reasonable possibility that the jury's verdict would have been different. Cf. *N. L. R. B.* v. *J. S. Popper, Inc.*, 113 F. 2d 602, 604 (C. A. 3).

E. The validity of the appointments of members of the Board

Petitioner challenges the legality of the appointment of three of the Board members—Brown, McHale, and Coddaire—for the period between their original recess appointment by the President on October 23, 1950, and their confirmation by the Senate on August 9, 1951 (which petitioner concedes was legal) (Pet. 80–83). We submit that the challenge is without substance and, further, that even if technically worthy of consideration, it would be irrelevant in the cir-

cumstances of this case. The relevant facts are as follows:

On September 23, 1950, the Second Session of the 81st Congress enacted the Subversive Activities Control Act by passing it over a Presidential veto (see 64 Stat. 1031) and adjourned on the same day pursuant to a concurrent resolution of both Houses to a day certain, namely, November 27, 1950 (96 Cong. Rec. 15726). On October 23, 1950, the President, by recess appointments, appointed five members to the Board, including Brown, McHale, and Coddaire. On November 27, 1950, the Second Session of the 81st Congress reconvened pursuant to the resolution of adjournment, and the President transmitted to the Senate his nominations of the Board members (96 Cong. Rec. 15785). On January 2, 1951, the Second Session of the 81st Congress adjourned *sine die* (96 Cong. Rec. 17121, 17138) without the Senate having acted on the nominations. On the following day, January 3, 1951, the First Session of the 82d Congress convened, and on February 12, 1951, the President resubmitted the nominations to the Senate for confirmation (97 Cong. Rec. 1228). On April 23, 1951, hearings for the purpose of taking evidence in this proceeding commenced before a hearing panel of three Board members, including Brown and McHale (R. 1). On August 9, 1951, the nominations of Brown, McHale, and Coddaire were confirmed by the Senate (97 Cong. Rec. 9702).

Petitioner contends first that the recess appointments of October 23, 1950, were invalid *ab initio,* with the consequence that, allegedly, the members in question did not validly became members of the Board until their confirmation by the Senate on August 9, 1951, following the resubmission of their nominations on February 12, 1951, during the First Session of the 82d Congress (Pet. 81). Alternatively it argues that even assuming the recess appointments were valid originally they expired with the expiration of the Second Session of the 81st Congress on January 2, 1951, without the Senate having acted on them (*ibid.*); under this view there was a hiatus in the challenged members' membership from the latter date until August 9, 1951, when they were finally confirmed. Under either view, it is argued, they were "usurpers" (Pet. 82) at least from January 2, 1951, to August 9, 1951, during which period proceedings were conducted by the Board, including the beginning of the taking of testimony before a panel which included two of the members in question. We submit that neither branch of this contention has merit; that the recess appointments were valid when made and remained valid at all times thereafter until final Senate confirmation.

The contention that the recess appointments were invalid *ab initio* is based on three alternative arguments.

First, it is contended, no "vacancies" had "happened" within the meaning of the constitutional provision conferring power on the President to "fill up" such vacancies "during the Recess of the Senate" (Art. II, sec. 2, cl. 3).[24] According to the argument, "[t]he term 'vacancies' as used in this clause refers to those occurring by reason of death, resignation, promotion or removal. No vacancy 'happens' in the constitutional sense when an office is newly created by law" (Pet. 81). It is obvious, however, that this construction would frustrate to an important degree the purpose of the constitutional provision, which is to enable the business of government to be carried on through temporary appointments during periods when the Senate is not available to act on nominations to office. Hence this aspect of petitioner's contention is clearly without merit. 12 Op. Atty. Gen. 455; 18 Op. Atty. Gen. 28; 19 Op. Atty. Gen. 261.

Secondly, it is argued, "even if the vacancies on the Board 'happened,' they arose simultaneously with the passage of the Act while the Senate was in session and therefore did not happen 'during the Recess'" (Pet. 81). This prong of the argument is equally invalid. "The constitution does not look to the moment of the

[24] The clause reads: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

origin of the vacancy, but to the state of things at the point of time at which the President is called on to act. Is the Senate in session? Then he must make a nomination to that body. Is it in recess? Then the President must fill the vacancy by a temporary commission." 1 Op. Atty. Gen. 631, 633.[25]

Thirdly, it is argued, "the Recess" contemplated by the constitutional clause "means the recess *sine die* following an annual or extraordinary session of Congress. It does not include the period following an adjournment to a day certain such as the period of the adjournment of the 81st Congress from September 23 to November 27, 1950" (Pet. 81). Hence, according to the argument, the appointments of October 23, 1950, were invalid as "recess appointments" because not made during a "Recess of the Senate." This contention is also without merit. Intrasessional adjournments to a day certain as well as *sine die* adjournments between sessions are recesses within the meaning of the clause. *Gould* v. *United States,* 19 Ct. Cl. 593, 595–596; 33 Op. Atty. Gen. 20; 5 Hind's *Precedents of the House of Representatives,* § 6687; cf. *The Pocket Veto Case,* 279

[25] Followed in *In re Farrow,* 3 Fed. 112 (C. C., N. D. Ga.); 2 Op. Atty. Gen. 525; 3 Op. Atty. Gen. 673; 10 Op. Atty. Gen. 356; 12 Op. Atty. Gen. 32; 12 Op. Atty. Gen. 455; 14 Op. Atty. Gen. 562; 15 Op. Atty. Gen. 207; 16 Op. Atty. Gen. 538; 18 Op. Atty. Gen. 28, 29; 19 Op. Atty. Gen. 261; 30 Op. Atty. Gen. 314; 33 Op. Atty. Gen. 20.

U. S. 655, 686; *Wright* v. *United States*, 302 U. S. 583.[26]

Equally without merit is petitioner's alternative argument that "if the adjournment of Congress from September 23 to November 27, 1950 was in fact 'the Recess,' then the sitting of the Senate that commenced on the latter date must have been its 'next Session,'" with the consequence, it is argued, that "the appointments expired on January 2, 1951 when the 'next session' ended upon the *sine die* adjournment of the 81st Congress" (Pet. 81). The sitting from November 27, 1950, to January 2, 1951, was merely a continuation of the same session (Second Session of the 81st Congress) following an *ad interim* adjournment to a day certain. The "next Session" was the First Session of the 82d Congress, which did not begin until January 3, 1951. Since according to the terms of the constitutional clause recess appointments do not expire until "the End" of the "next Session," the recess appointments here in issue remained valid at all times up to final Senate confirmation during this "next Session." *Gould* v. *United States, supra*, 19 Ct. Cl. 593, 595–596; see Gilfry, *Senate Precedents*, 1789–1913, p. 30; 5 Hind's *Precedents of the*

[26] See also the Report of the Senate Judiciary Committee presented March 2, 1905, in response to a Senate Resolution calling upon it to construe the clause in question (Sen. Rep. No. 4389, 58th Cong., 3d sess., reproduced at 39 Cong. Rec. 3823–3824).

House of Representatives, §§ 6676–6687; 20 Op. Atty. Gen. 503.

In any event, even if there were technical merit in any of petitioner's contentions, the validity of the Board's final order would not be affected. As the court below observed (Op. 48, R. 2130):

> The appointments were indubitably valid from August 9, 1951. The taking of evidence, which began April 23, 1951, did not conclude until July 1, 1952. The evidence was taken by a panel of members, but it could have been taken by a hearing examiner (Section 13 (c) of the Act) and not by a member at all. * * * All findings and conclusions were adopted by a properly confirmed Board after hearing before that Board. The order therefore would be valid regardless of the technical legal status of the members as members prior to formal Senate confirmation.

CONCLUSION

While the case is of course one of importance, it was decided correctly below and there is no conflict of decisions involved. The petition for a writ of certiorari should therefore be denied. If, however, because of the importance of the interests involved, the Court determines to issue the writ, we urge that it be limited to those questions involving the constitutionality of the

Act which are adequately presented on this record and of sufficient merit to call for consideration by this Court at this time.

Respectfully submitted,

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